

Office of the Secretary of Labor

§ 70.26

whole or in part shall so notify the requester in writing. The notice must be signed by the disclosure officer or his designee, and shall include:

(1) The name and title or position of the disclosure officer and if applicable, of the designee.

(2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions which the component has relied upon in denying the request.

(3) A statement that the denial may be appealed under § 70.22 and a description of the requirements of that subsection.

(c) *Record cannot be located or has been destroyed.* If a requested record cannot be located from the information supplied, or is known or believed to have been destroyed or otherwise disposed of, the component shall so notify the requester in writing.

§ 70.22 Appeals from denial of requests.

When a request for access to records or for a waiver of fees has been denied in whole or in part, where a requester disputes matters relating to the assessment of fees, or when a component fails to respond to a request within the time limits set forth in the FOIA, the requester may appeal the denial of the request to the Solicitor of Labor. The appeal must be filed within 90 days of:

(a) The denial, actual or constructive, of the request, including a denial of a request for a fee waiver,

(b) An agency's response on a dispute of matters relating to the assessment of fees, or

(c) In the case of a partial denial, 90 days from the date the material was received by the requester.

The appeal shall state, in writing, the grounds for appeal, including any supporting statements or arguments. To facilitate processing, the appeal should include copies of the initial request and the response of the disclosure officer. The appeal shall be addressed to the Solicitor of Labor, Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Both the envelope and the letter of appeal itself must

be clearly marked: "Freedom of Information Act Appeal."

[54 FR 23144, May 30, 1989; 54 FR 25204, June 13, 1989]

§ 70.23 Action on appeals.

The Solicitor of Labor, or his designee, shall review the appellant's supporting papers and make a determination de novo whether the denial specified in § 70.22 was proper and in accord with the applicable law.

§ 70.24 Form and content of action on appeals.

The disposition of an appeal shall be in writing. A decision affirming in whole or in part the denial of a request shall include a brief statement of the reason or reasons for the affirmance, including each FOIA exemption relied upon and its relation to each record withheld, and a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides or has his principal place of business, the judicial district in which the requested records are located, or the District of Columbia. If it is determined on appeal that a record should be disclosed, the record should be provided promptly in accordance with the decision on appeal.

§ 70.25 Time limits and order in which requests and appeals shall be processed.

Components of the Department of Labor shall comply with the time limits required by the FOIA for responding to and processing requests and appeals, unless there are exceptional circumstances within the meaning of 5 U.S.C. 552(a)(6)(C). A component shall notify a requester whenever the component is unable to respond to or process the request or appeal within the time limits established by the FOIA.

§ 70.26 Predisclosure notification to submitters of confidential commercial information.

(a) *In general.* FOIA requests for confidential commercial information provided to the Department by business submitters shall be processed in accordance with this section.

(b) *Designation of confidential commercial information.* Business submitters of information to the Department, at the time of submission or within a reasonable time thereafter, may designate specific information as confidential commercial information subject to the provisions of this section. Such a designation may be made for information which the submitter claims could reasonably be expected to cause substantial competitive harm. The designation must be in writing and whenever possible, the submitter's claim of confidentiality shall be supported by a statement or certification by an officer or authorized representative of the submitter that the identified information in question is, in fact, confidential commercial or financial information and has not been disclosed to the public.

(c) *Notice to submitters of confidential commercial information.* A component shall provide a business submitter with prompt written notice of a request encompassing its business information whenever required under paragraph (d) of this section, and except as is provided in paragraph (g) of this section. Such written notice shall either describe the nature of the confidential commercial information requested or provide copies of the relevant records or portions thereof.

(d) *When notice is required.* (1) For confidential commercial information submitted to the Department prior to January 1, 1988, the component shall provide a business submitter with notice of a request whenever:

(i) Less than 10 years have passed since the date the information was received by the Department and the information is subject to prior express commitment of confidentiality given by the component to the business submitter, or

(ii) The component has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(2) For confidential commercial information submitted to the Department on or after January 1, 1988, the component shall provide a business submitter with notice of a FOIA request whenever:

(i) The business submitter has in good faith previously designated the information as commercially or financially sensitive information, or

(ii) The component has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

Notice of a request for confidential commercial information falling within paragraph (d)(2)(i) of this section shall be required for a period of not more than ten years after the date of submission. The business submitter may request a specific notice period of greater duration. The submitter should provide a justification for such a request. In such a case, the Department may, in its discretion, provide for an extended notice period.

(e) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, a component shall afford a business submitter a reasonable period within which to provide the component with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under Exemption 4 of the Freedom of Information Act, and shall demonstrate the basis for the contention that the information is a trade secret or commercial or financial information that is privileged or confidential. Information provided by a business submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(f) *Notice of intent to disclose.* A component shall consider a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information which has been designated by the submitter as confidential commercial information. Whenever a component decides to disclose such information over the objection of a business submitter or designee, the component shall notify the business submitter in writing. Such notice shall include:

(1) A description of the information to be disclosed;

(2) A specified disclosure date;

(3) A statement of why the submitter's objections were not sustained.

Such notice of intent to disclose shall to the extent permitted by law be

forwarded a reasonable number of days prior to the specified date upon which disclosure is intended. The requester shall be provided with a copy of the notice of intent to disclose.

(g) *Exceptions to notice requirements.* The notice requirements of this section shall not apply if:

(1) The component determines that the information should not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public; or

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552).

(4) The disclosure is required by a rule that

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act; and

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(5) The information requested has not been designated by the submitter as in accordance with paragraph (b) of this Section, and the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the component has reason to believe that disclosure of the information would result in substantial competitive harm; or

(6) The designation made by the submitter in accordance with these regulations appears obviously frivolous; except that in such case, the component must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

(h) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of confidential commercial information covered by paragraph (b) of this section, the component shall promptly notify the business submitter.

(i) *Notice requirements.* The component shall fulfill the notice requirements of this section by addressing the notice to the business submitter or its legal successor at the address indicated on the records, or the last known address. If the notice is returned, the component shall make a reasonable effort to locate the business submitter or its legal successor. Where notification of a voluminous number of submitters is required, such notification may be accomplished by posting and publishing the notice in a place reasonably calculated to accomplish notification.

§ 70.27 Preservation of records.

Each component shall preserve all correspondence relating to the requests it receives under this part, and all records processed pursuant to such requests, until such time as the destruction of such correspondence and records is authorized pursuant to title 44 of the United States Code. Under no circumstances shall records be destroyed while they are the subject of a pending request, appeal, or lawsuit under the Act.

Subpart C—Costs for Production of Documents

§ 70.38 Definitions.

The following definitions apply to the terms of this subpart.

(a) The term a *statute specifically providing for setting the level of fees for particular types of records* (See 5 U.S.C. 552(a)(4)(A)(vi)), means any statute other than FOIA that specifically requires a Government agency to establish a fee schedule for particular types of records. An example of such a statute is section 205(c) of the Labor-Management Reporting and Disclosure Act, as amended, 29 U.S.C. 435(c). Statutes such as the User Fee Statute which only provide a general discussion of fees without explicitly requiring that an agency set and collect fees for particular documents are not within the meaning of this term.

(b) The term *direct costs* means those expenditures which an agency actually incurs in searching for and duplicating (and in the case of a commercial requester, reviewing) documents to respond to an FOIA request. Direct costs